



Legislative Update

Covering Criminal Justice Legal Issues

Department of Public Advocacy

No. 2, 1998

From the Public Advocate:

Erwin W. Lewis



3 Legislative Initiatives: DPA is working to have three legislative initiatives implemented by the 1998 Kentucky General Assembly:

- 1) *DPA's request for a 15% increase in its General Fund appropriations;*
- 2) *a series of 7 changes to KRS Chapter 31, and*
- 3) *death penalty legislation eliminating racially biased death sentences, eliminating death for juveniles, and making the current prohibition of death for the mentally retarded retroactive.*

Each are described in this issue and need your support.

8 Funding Endorsements. Endorsements of DPA's critically needed funding increases have come from the:

- Governor's Criminal Justice Response Team;
- Kentucky Bar Association Board of Governors;
- Department of Juvenile Justice's Juvenile Justice Advisory Board;
- Kentucky Association of Criminal Defense Lawyers;
- Courier-Journal;
- Lexington Herald-Leader;
- Northern Kentucky Children's Law Center;
- The Spangenberg Group.

Insufficient Funding. DPA is funded at \$170 per case. According to a 1991 Economic Survey by the Kentucky Bar Association, an average fee in 1991 for representation of a person charged with a DUI was \$508; \$400 for a misdemeanor in district court; and, for a felony in circuit court it was \$2,967.

Contact your legislator on these legislative initiatives and express your opinion so they have the benefit of your views and experience. Together, we can influence a better Kentucky criminal justice system.

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Funding Increase for DPA Asked for by Public Advocate

The Governor's budget proposes funding of the capital post-conviction branch. This is very significant since DPA lost its federal Byrne grant funding in July 1997 for this critical effort. The Governor's budget proposes general fund dollars for the juvenile post-dispositional branch. The rest of the proposed budget has a continuation 3% increase.

Public Advocate, **Ernie Lewis**, appeared before the House Budget Review Subcommittee, which considers the Department of Public Advocacy's budget, on January 29, 1998 and presented the DPA plan for increased funds. The Committee is chaired by **Representative Mark Brown** of Brandenburg, and its members are **Royce Adams** of Dry Ridge; **Charles Siler** of Williamsburg; **Jim Wayne** of Louisville; **Roger Thomas** of Smiths Grove; **Jim Gooch, Jr.** of Providence; and, **Drew Graham** of Winchester.

An additional \$3 million yearly was requested of the House Budget Review Sub-Committee by Public Advocate Lewis to provide adequate representation for DPA clients. The 15% increase would be used to:

- Enhance the quality of juvenile representation statewide by providing:
 - 5 new full-time offices;
 - additional juvenile trial lawyers in existing offices;
 - a juvenile trainer;
 - more juvenile appellate lawyers;
- Fund Jefferson and Fayette County Public Defender Offices to achieve caseload and salary parity;
- Provide new appellate lawyers

The need for these additional funds are compelling when the facts are reviewed:

- DPA provides a constitutionally required service.
- DPA handled nearly 100,000 cases in FY 97 at \$170 per case, the lowest funded public defender agency in the nation.
- DPA caseload increased by 5% last year.
- High caseloads and insufficient resources have particularly affected DPA's ability to provide adequate representation in juvenile court.
- The deficit in juvenile representation occurs at a time of increased penalties and rising juvenile caseloads.
- DPA needs additional resources to meet its constitutional obligations particularly in juvenile court.
- DPA's goal is to cover 85% of the caseload through full-time public defenders.
- DPA's urban offices handle a very large percentage of defender cases in Kentucky and they need additional resources to reduce unethically high caseloads.

DPA has been chronically underfunded, receiving a continuation budget for the last three years at a time of increasing caseloads. High caseloads are threatening the quality of services being delivered by conscientious but overworked public defenders. DPA's request is a modest increase in funds to enable funding to go from \$170 to \$190 per case, still one of the lowest in the nation. The funding would enable DPA to narrow the gap with prosecutors, who now receive over three times the moneys going to public defense.

Juvenile Defender Deficits

Funding for Kentucky public defenders is not adequate for the nearly 100,000 clients represented yearly. DPA's per case funding is the lowest in the country. Statewide juvenile representation by defenders was criticized in

November 1996 by the Children's Law Center, Inc. of Northern Kentucky in a statewide study, *Beyond In Re Gault: The Status of Juvenile Defense in Kentucky* for the inadequacy of DPA's representation of juveniles. DPA was criticized for placing inexperienced lawyers in juvenile court, having untrained part-time lawyers in juvenile court, and most seriously for having a large percentage of juveniles without lawyers of any kind at the time of their case. Additional full-time staff; additional funds for contract counties, and additional education for specialized juvenile litigation are required to meet the identified statewide juvenile inadequacies.

Spangenberg's Evaluation

The Spangenberg Group, headed by Robert Spangenberg who is the preeminent consultant in the country on indigent defense issues, did on-site visits with Michael Schneider in Kentucky on December 1-3, 1997, visiting Louisville, Lexington, Hazard, Owensboro, Pineville and London. *The Spangenberg Group* issued a preliminary report, which was presented at the House Budget Review Subcommittee by Public Advocate Ernie Lewis on January 29, 1998. The major findings made by *The Spangenberg Group* were:

- Full support for the three primary goals of DPA's plan for 1998-2000, improvement in juvenile representation and the reduction of caseloads; funding of Jefferson and Fayette County public defender offices to enhance caseload and salary parity, and improving the quality and cost effectiveness of DPA's delivery of defender services in capital cases. *"In our opinion, if adequate funding is provided to realize these goals, the quality of indigent defense services will be improved throughout the Commonwealth."*
- The problems of caseload were so overwhelming that the budget plan requested by DPA would be insufficient to adequately address the caseload problem. *"We believe that the magnitude of problems confronting DPA is profound warranting longer term more significant changes."*
- The Kentucky juvenile system was badly in need of repair. Juveniles were being forced to "waive" counsel 'because defense attorneys were not readily available,'" juvenile co-defendants being represented by the same attorney, and *"substandard representation at all stages of the process, including inadequate contact with their attorneys, inadequate investigation of their cases, little or no pretrial motion practice, as well as inadequate preparation for trial and dispositional proceedings."*
- *"The comparatively modest funding increase requested by DPA for Jefferson and Fayette Counties is desperately needed for the coming biennium."*
- The need for improvements in DPA's delivery of services in capital cases.

The Judiciary's Funding Increases

Defenders not only serve clients, defenders serve the courts. When more judges are added, DPA must serve those additional judges.

The proposed budget for the Courts includes requests for additional circuit judges for the circuit of Marian, Taylor, Green and Washington, the Boone-Gallatin circuit, and the circuit of Woodford, Scott and Bourbon Counties. The judicial budget also includes new district judges for Floyd County and Barren/Metcalf.

The judicial budget includes \$500,000 for a court designated worker case management system, and \$700,000 for technology improvement system in Jefferson County.

Finally, additional money is being requested by the judiciary to establish family courts in six Kentucky Supreme Court judicial districts. These increased judicial resources will place new demands on the already strapped defender resources.

Budget Impact on DPA

The Governor's budget includes many items relevant to criminal justice matters, many of which affect DPA. They are as follows:

- The creation of a Criminal Justice Council, where policy recommendations would be made by various members of the criminal justice system.
 - Three new secure juvenile detention facilities and funds for the replacement of Kentucky's maximum-security juvenile detention facility.
 - A new major prison to hold 1800 inmates.
 - Expansion of the Pewee Valley Women's Prison.
 - Bonds for the construction of a law enforcement basic training complex at Eastern Kentucky University.
 - A new radio system for the Kentucky State Police.
 - An upgrade and expansion of AFIS fingerprint system.
 - Funds to establish a psychiatric security review board.
 - A one-time funding increase to increase the number of children advocacy centers.
 - Spouse abuse centers in a number of different places.
 - 2.5 million dollars for child protection legislation.
 - \$247,000 in FY 99 and \$330,000 in FY 2000 to fund 15 additional victims advocates in commonwealth attorneys' offices, resulting in all Commonwealth Attorneys having a victim's advocate.
 - 5.5% in FY 99 and 5% in FY 2000 for the budgets of the county and commonwealth attorneys.
 - Victim witness protection plan which would support statewide victim witness protection program.
 - Almost one million dollars each year of the biennium for the Victim Notification System (VINE).
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Prosecutor's Converting to Full-Time

In 1996 House Bill 160 provided \$2,091,300 to Kentucky prosecutors to convert 22 Commonwealth Attorneys from part-time to full-time, providing improved effectiveness and efficiency. Full-time prosecutors cover 64 counties compared to 50 counties covered by full-time defenders.

As of 1998, 36 of the 56 Commonwealth Attorneys are now full-time prosecutors. On February 10, 1998, Attorney General Chandler asked the Senate Appropriations and Revenue Committee for funds beyond those in the proposed budget for \$367,000 for the Commonwealth Attorneys and for \$536,000 for the county attorneys in each of the fiscal years of the biennium for additional staff positions and staff position upgrades, including some assistant commonwealth attorneys going from part-time to full-time.

This would include converting 4 more commonwealth attorneys to full-time prosecutors, bringing the full-time commonwealth attorneys to 40 of the 56.

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CRIMINAL JUSTICE BUDGETS, TOTAL FUNDS, FY 1998, 1999, 2000

AGENCY	%	REVISED FY 98	%	RECOMMENDED FY 99	%	RECOMMENDED FY 00
Corrections	37.9%	\$270,252,700	36.9%	\$274,888,600	36.5%	\$295,016,700
Judiciary	20.2%	143,563,100	20.6%	153,338,000	20.5%	165,672,5
State Police	15.3%	108,698,600	15.0%	111,961,600	14.7%	118,703,4
Juvenile Justice	9.8%	69,811,700	10.9%	81,617,800	12.0%	96,670,9
Prosecution	7.8%	55,840,600	7.6%	56,515,700	7.3%	59,118,8
Criminal Just. Training	3.6%	25,860,000	3.5%	25,932,500	3.7%	30,088,0
Justice Administration	2.7%	19,542,500	2.9%	21,993,100	2.8%	22,326,4
DPA	2.6%	18,595,600	2.6%	19,611,100	2.5%	20,257,1
TOTAL	100%	\$712,164,800	100%	\$745,858,400	100%	\$807,853,4

Racial Justice Act Passes Senate 22-12: Not Soft on Crime, But Strong on Justice

Senate Bill Committee Substitute 171 sponsored by **Senator Gerald Neal** of Louisville passed the Senate 22-12 on Thursday, February 5, 1998 after two hours of vigorous debate. The identical House Bill No. 543 sponsored by **Representative Jesse Crenshaw** of Lexington was introduced February 9, 1998 in the House. These bills fix one of the glaring deficits in Kentucky's capital scheme identified by the American Bar Association's Call for a Moratorium. The bills create a pretrial process to have a judge determine whether race is a part of a capital prosecution.

ABA Calls for Moratorium. The ABA House of Delegates in a February 3, 1997 Resolution (No. 107) called for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed. Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency." Kentucky mirrors that national reality. The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. The ABA's call for a suspension of executions focuses on: 1) incompetency of counsel; 2) racial bias; 3) mentally retarded persons; 4) persons under 18 years of age; and, 5) preserving state & federal post-conviction review. In light of the Kentucky reality, changes in Kentucky statutes must be made to correct the unfair implementation of the law.

Discrimination Exists in Kentucky Capital Sentencing on the Basis of the Race of Either the Victim or Defendant. There are 7 African-Americans on Kentucky's death row of 31. This represents 22% of the death row population, compared with Kentucky's non-white population of 7.7%. All the victims of these 7 death row inmates were white. A study commissioned by the 1992 Kentucky General Assembly of all homicides between 1976 and 1991, Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993), demonstrates race is a factor in Kentucky capital sentencing. Defendants were more likely to be sentenced to death if their victims were white, most especially if the defendant was black. A Racial Justice Act provides a method to eliminate race from the death process by allowing a judge to consider the relevant statistical and other evidence of discrimination before trial.

Racism is the opposite of treating each individual as unique, with punishment and treatment particularized to who he/she is or what he/she has done. Rather, racism treats persons with the same color of skin regardless of who they are or what they have done. There is evidence that prosecutors/judges/juries have historically discriminated against black defendants who have killed white victims. The Racial Justice Act seeks to eliminate race from the calculus, freeing all of the parties to treatment each defendant in a particular way without the broad taint of generalized racism. During the floor debate, Sen. Gerald Neal of Louisville said SB 171 was simply a method of insuring racism did not play a role in death sentences. He observed that under his bill, defendants bore a high threshold to prove race was a factor. Sen. Charlie Borders of Russell said, "This is a vote on whether we're soft on crime." Sen. Neal championed the bill's intent by stating, **"I'm not soft on crime. I'm strong on justice."** Sen. Neal said some senators were using "scare tactics" to attack the bill. "They don't want the status quo disturbed."

"The ABA's Moratorium Call," Public Advocate **Lewis** said, "acts as a moral statement condemning the Kentucky death penalty until change is made. DPA is advocating for legislation that would address a number of the problems identified by the ABA: The Racial Justice Act, the abolition of the death penalty for juveniles, and making retroactive the abolition of the death penalty for persons with mental retardation."

Senate Judiciary Committee Members	House Judiciary Committee Members	Appropriations & Revenue
Ernesto Scorsone (D), Chair 167 W. Main Lexington, Kentucky 40507	Michael Bowling (D), Chair P.O. Box 859 Middlesboro, Kentucky 40965	Gross Lindsay (D) P.O. Box 19 Henderson, Kentucky 42420
Tim Philpot (R), Vice-Chair 3475 Lyon Drive Lexington, Kentucky 40513	Jim Lovell (D), Vice-Chair 625 High Street Paris, Kentucky 40361	Herbie Deskins (D) Box 1199 Pikeville, Kentucky 41501
Gary Johnson (D) P.O. Box 231 Pikeville, Kentucky 41502	Rob Wilkey (D) 1418 Reeder School Road Franklin, Kentucky 42134	Frank Rasche (D) 2929 Jefferson Street Paducah, Kentucky 42001
Julie Rose (R) 4600 Doe Spring CourtLouisville, Kentucky 40241	Katie Kratz Stine (R), Vice-Chair 15 Cliffview Ft. Thomas, Kentucky 41075	Charles Geveden (D) P.O. Box 518 Wickliffe, Kentucky 42087
Nick Kafoglis (D) 1008 Newman Drive Bowling Green, Kentucky 42101	Kevin D. Bratcher (R) 5205 Constance Drive Louisville, Kentucky 40272	Kathy W. Stein (D) 364 Transylvania Park Lexington, Kentucky 40508
Larry Saunders (D) 736 Polatka Road Louisville, Kentucky 40214	Jeffrey Hoover (R) P.O. Box 985 Jamestown, Kentucky 42629	Bob Heleringer (R) 14209 Glendower Drive Louisville, Kentucky 40245
David K. Karem (D) 2439 Ransdell Avenue Louisville, Kentucky 40204	Stan Cave (R) P.O. Box 2150 Lexington, Kentucky 40595	Arnold Simpson (D) Shutt Mansion, 28 West Fifth Street Covington, Kentucky 41011
Elizabeth Tori (R) 2851 S. Wilson Road Radcliff, Kentucky 40160	Susan Johns (D) 3120 Runnymede Road Louisville, Kentucky 40222	Kathy Hogancamp (R) 300 Acorn Lane Paducah, Kentucky 42003
Gerald A. Neal (D) 1718 W. Jefferson Louisville, Kentucky 40203	Perry Clark (D) 5706 Elmer Lane Louisville, Kentucky 40214	John Vincent (R) P.O. Box 2528 Ashland, Kentucky 41105
Jack Westwood (R) 36 Forest Avenue Erlanger, Kentucky 41018	Thomas R. Kerr (D) 5415 Old Taylor Mill Road Taylor Mill, Kentucky 41015	<u>A & R Senate Committee</u> Benny Ray Bailey (D), Chair Charlie Borders (R), Vice-Chair Lindy Casebier (R) Glenn Freeman (D) Gary C. Johnson (D) Virgil Moore (R) Denny Nunnelley (D) Joey Pendleton (D) John A. "Eck" Rose (D)
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David L. Williams (R)
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A & R House Committee

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* Charles L. Siler (R)
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Mark Treesh (R)
* Jim Wayne (D)
Pete Worthington (D)
James F. Zimmerman (R)

* = Members of Subcommittee that considers DPA Budget. Other members of that committee include Roger Thomas of Smiths Grove; Jim Gooch, Jr. of Providence; and Drew Graham of Winchester.

Juvenile & Mental Retardation Death Penalty Legislation

Mentally Retarded and Mentally Ill Defendants. Since July 1990, Kentucky has had a procedure for identifying those persons who are seriously mentally retarded and eliminating death as a possible punishment for those individuals, KRS 532.135 and 532.140. Nevertheless, Kentucky still has mentally retarded defendants sentenced before 1990 on death row, and severely mentally ill defendants continue to be sentenced to death.

Persons Under the Age of 18 at the Time of Their Offense. Kentucky allows a person to be executed if 16 years of age or older under KRS 640.040. Currently, 25 of the states with death penalty statutes and 5 other countries have laws that allow juveniles to be executed. Since the reinstatement of the death penalty in 1976, 9 people have been executed for crimes committed as 17 year olds. Of the 143 juvenile death sentences imposed since 1973, 91% have resulted in reversals. The statutes should be changed to eliminate death as a possible punishment for those 16-18 years of age.

Children are denied a number of significant rights due to their inability to exercise sound discretion. We deny children the right to sit on a jury under the age of 18, the right to drink under the age of 21, the right to vote until the age of 18, among other rights. The reason for this is clear: we as a society have decided that juveniles cannot be expected to exercise mature judgment on most matters. Given that recognition it is inconsistent to hold these children ultimately responsible when they commit a capital offense. Holding a sixteen or seventeen year old ultimately responsible and sentencing him/her to death is inconsistent with the remainder of our social policy toward 16 and 17 year olds.

If deterrence continues to be one of the justifications for capital punishment generally, it is far less so for juveniles. Teenagers are often reckless and impulsive and cannot be expected to be deterred by capital punishment.

Historically, the death penalty has been racist as applied to juveniles. Two thirds of the 288 children executed in American history have been black. Of forty executions of children in the United States for rape or attempted rape, 100 percent of them were black. Six of seven juveniles executed in Kentucky since 1900 were black. Two thirds of the children on the nation's death row at the present time are minorities.

The statute should be changed to eliminate death as a possible punishment for those 16-18 years of age and have the maximum sentence for a juvenile convicted of a capital crime be life imprisonment without the possibility of parole for 25 years.

Judge Endorses Racial Justice Act

In a 1996 letter (reaffirmed February 1998) to Rep. Mike Bowling, chair of the House Judiciary Committee, retired Circuit Judge Benjamin F. Shobe reflects on the Racial Justice Act:

I address you as an African-American former Circuit Judge, whose legal experience in Kentucky exceeds fifty years. During this time, I presided in cases in which the death penalty was sought and obtained both pre-*Furman* and after *Gregg*.

My concern is SB 132/SCS [now SB 171] which proposes to at least increase the perception of fairness in the death penalty procedures of Kentucky. Because the death penalty is our society's ultimate punishment, citizens realize its application must be supremely fair and, therefore, expect that racial bias play no role in its use. SB 132/SCS [now SB 171] proposes only to insure that the death penalty not be sought on the basis of race. This seems to me to be the least we can do to help erase the perception of minorities that they do not get a fair deal before the courts.

I have received the proposed legislation, with an eye toward considering the objections which have been raised by prosecutors. One of their objections is that this bill will erase the death penalty in Kentucky. This is entirely untrue. If restrictions upon the issuance of capital punishment are to be looked upon as matters of abolition, then we would no longer need present requirements such as consideration of mitigating circumstances, juries that meet the *Batson* standard, and proportionality reviews by the Kentucky Supreme Court. Are we to believe and can we tell our constituents that death penalty procedures in this State are so infected by race bias that no capital case could ever be tried in which the death penalty is sought? Of course, not.

The objection that such procedures required by the bill are onerous and costly has very little merit. After all, judicial decisions are made frequently based upon statistical information, and properly so. It has been my experience that those charged with the responsibility of presenting such information have the greater responsibility. Therefore, the burden to present evidence of racial bias is upon the accused. May we say to them that any information which would tend to show that they were accused and convicted because of race should not be a part of the proceeding? Of course, not.

With the experience this nation underwent as a result of the *Miranda* decision, policemen have become more professional. Should prosecutors object to having their actions scrutinized to determine whether they are free from untoward motivations? Of course, not. As a former prosecutor, I recognize the obligation of this officer to be eminently fair. This legislation requires no more.

I am grateful for your support of the pending measure and assure you that the citizens of Kentucky will be relieved when passage of this bill guarantees greater racial justice and harmony in our Commonwealth.

FACTS ON THE JUVENILE DEATH PENALTY

THE 1997 ABA MORATORIUM CALL IS BASED IN PART ON THE FACT THAT THE STATES CONTINUE TO SENTENCE CHILDREN TO DEATH.

In the 1988 report of the Criminal Justice Section of the ABA, it was stated that "The spectacle of our society seeking legal vengeance through execution of a child should not be countenanced by the ABA."

THE JUVENILE DEATH PENALTY IS RACIST

- 2/3rds of the 288 children executed in the nation's history were black.
- 100% of the 40 children executed in the U.S. for the crimes of rape or attempted rape were black.
- 2/3rds of children now on death row in the United States are black, including the one individual on Kentucky's death row who committed his crime as a juvenile.
Six of the seven children executed in Kentucky history have been black.

KRS Chapter 31 Administrative Bill Assigned to State Government Committee

KRS Chapter 31 should be rewritten in its entirety. In the meantime, there are several areas which need to be improved.

House Bill 337 sponsored by **Representative Kathy Stein** of Lexington makes administrative changes to update KRS Chapter 31 to current realities. The 7 modifications to the chapter are:

1. Eliminates hourly rates of \$25 for out-of-court and \$35 for in-court work and case maximums of \$500, \$1,000, \$1,250, and replaces with the prevailing rate set by the Public Advocate.
2. Raises the administrative fee paid by defendants from \$40 to \$50 to further fund statewide defender programs.
3. Requires a judge to waive or reduce the administrative fee if the defendant lacks the financial ability to pay it.
4. Proposes collecting administrative fees through civil judgments.
5. Shifts responsibility for the funds for resources provided pursuant to Lincoln County Fiscal Court v. Sanders, 794 S.W.2d 162 (Ky. 1990) from DPA to the special account fund of KRS 31.185.
6. Brings Jefferson County into the statewide special account in KRS 31.185 for funds for experts.
7. Allows AOC to provide DPA with electronic rather than paper orders.

This is a reasonable package that would allow DPA to represent clients better. It has been assigned to the House State Government Committee chaired by Rep. Charles Geveden of Wickliffe, Kentucky.

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Proposed Budgets, 1999-2000, in millions		
	1999	2000
Ky. Public Defenders	\$19.6	\$20.2
Ky. Prosecutors	\$56.5	\$59.1